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ACTIVISION BLIZZARD, INC. and  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MIL-SPEC MONKEY, INC., a California  
corporation,

Plaintiff,

v.

ACTIVISION BLIZZARD, INC., a Delaware  
corporation; ACTIVISION PUBLISHING,  
INC., a Delaware corporation; and DOES 1 -  
25, inclusive,

Defendants.

CASE NO. CV14-02361 RS

**NOTICE OF MOTION AND MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AS TO PLAINTIFF'S SECOND, THIRD,  
FOURTH, AND FIFTH CLAIMS FOR  
RELIEF**

**MEMORANDUM OF POINTS AND  
AUTHORITIES**

[Declarations of Yale Miller, Marc E. Mayer,  
and Gilbert Lee in Support; and [Proposed]  
Order filed concurrently]

Date: November 20, 2014  
Time: 1:30 p.m.  
Judge: Hon. Richard Seeborg  
Courtroom: 3 – 17th Floor

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2

3 **PLEASE TAKE NOTICE** that on November 20, 2014, at 1:30 p.m., or as soon as the

4 matter may be heard, in the Courtroom of the Honorable Richard Seeborg of the United States

5 District Court for the Northern District of California, San Francisco Courthouse, Courtroom 3 –

6 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants Activision

7 Publishing, Inc. and Activision Blizzard, Inc. (“Activision”) will and hereby do move pursuant to

8 Fed. R. Civ. P. 56 for partial summary judgment on the Second, Third, Fourth, and Fifth Claims

9 for Relief of Plaintiff Mil-Spec Monkey, Inc. (“MSM”) for Trademark Infringement (Claim II),

10 False Designation of Origin (Claim III), Unfair Competition (Claim IV), and Common Law

11 Trademark Infringement (Claim V).

12

13 This Motion is made on the basis that MSM’s claims against Activision for trademark

14 infringement, false designation of origin, unfair competition, and common law trademark

15 infringement are barred by the First Amendment to the U.S. Constitution. Specifically, such

16 claims are precluded by Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989), and E.S.S.

17 Entertainment 2000 v. Rock Star Videos, 547 F.3d 1095, 1099 (9th Cir. 2008), because the use of

18 a purported monkey morale patch is artistically relevant to the video game *Call of Duty: Ghosts*

19 and its use in *Ghosts* is not explicitly misleading.

20

21 This Motion is based on this Notice of Motion and Motion and attached Memorandum of

22 Points and Authorities; the concurrently-filed Declarations of Yale Miller, Marc E. Mayer, and

23 Gilbert Lee, and exhibits thereto; all papers and pleadings on file in the action; any reply papers;

24 and any oral argument that the Court may entertain at the hearing on this Motion.

25

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27 //

28 //

1 DATED: October 16, 2014

KARIN G. PAGNANELLI  
MARC E. MAYER  
GILBERT S. LEE  
MITCHELL SILBERBERG & KNUPP LLP

4  
5 By: /s/ Marc E. Mayer

6 Attorneys for Defendants  
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8 ACTIVISION PUBLISHING, INC.  
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CASE NO. CV14-02361 RS

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## Introduction

Defendants Activision Publishing, Inc. and Activision Blizzard Inc. (collectively, “Activision”) are the makers and publishers of the video game *Call of Duty: Ghosts* (“*Ghosts*”), the most recent entry in Activision’s popular *Call of Duty* video game franchise.<sup>1</sup> As with the rest of the *Call of Duty* franchise, *Ghosts* is a realistic, highly competitive military action video game in which players assume the role of military soldiers to battle against each other in a variety of single-player and online multiplayer battlefields. Plaintiff Mil-Spec Monkey, Inc. (“MSM”) is a designer of military “morale patches,” which are interchangeable Velcro-backed patches that are commonly worn by soldiers on their uniforms or rucksacks to express their individuality or mood. Among the morale patches sold by MSM is a patch depicting an angry monkey face. In this action, MSM claims, among other things, that Activision has infringed MSM’s purported trademark in its angry monkey face design – and thereby confused consumers as to the source of the game *Ghosts* – because among the ways that players may customize their characters in *Ghosts* is by outfitting them with over six-hundred different personal morale patches, one of which depicts a different angry monkey face design (in actuality, that of a chimpanzee).

By this Motion, Activision seeks summary judgment on MSM’s claims for trademark infringement, false designation of origin, and unfair competition (and only these claims) for the single but dispositive reason that Activision’s alleged use of a monkey face patch in *Ghosts* is protected by the First Amendment. As has been made clear by the prevailing caselaw in this circuit and others, reference to another’s trademark in the context of an expressive work should not give rise to claims for trademark infringement. Indeed, a case decided one year ago involving trademark claims against another *Call of Duty* game confirms that the use of another’s trademark in conjunction with creating an authentic or convincing video game simulation of the real world is protected by the First Amendment. See generally NovaLogic, Inc. v. Activision Blizzard, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298 (C.D. Cal. June 18, 2013).

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<sup>1</sup> Activision Blizzard, Inc. is the parent company of Activision Publishing, Inc. Because Activision Publishing, Inc. was the party who marketed and published the game, Activision Blizzard, Inc. is not a proper party in the case. Nevertheless, for purposes of this Motion, the two entities are collectively referred to as “Activision.”

1 That same approach governs here. It is now well-established that in assessing whether  
 2 claims arising from the use of a trademark in an expressive work, including a video game, are  
 3 barred by the First Amendment, courts in this Circuit apply the two-part test set forth in Rogers v.  
 4 Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989). See Brown v. Electronic Arts, Inc., 724 F.3d 1235,  
 5 1235 (9th Cir. 2013); NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*33-\*34.  
 6 “The Rogers test is relatively straightforward to apply, and is very protective of speech,” id. at  
 7 \*35, and accordingly, under the Rogers test, the use of a trademark in an expressive work would  
 8 fall outside the protection of the First Amendment only where (1) the use of the mark has **no**  
 9 artistic relevance to the underlying work whatsoever, or, (2) if it has some artistic relevance, it  
 10 explicitly misleads consumers as to the source or the content of the work.

11 Both prongs of this test plainly are met here. MSM cannot credibly claim that the use of  
 12 military patches, including a patch depicting a monkey, has **no** artistic relevance whatsoever to a  
 13 video game about military soldiers. To the contrary, MSM specifically alleges in its Complaint  
 14 that as a general matter, “morale patches are popular among military personnel” as a means of  
 15 “allow[ing] the wearer to express a sense of personal sense of identity,” and that one of the best  
 16 known morale patches is its angry monkey patch. Compl. ¶¶ 14-15, 18. MSM has furthermore  
 17 disseminated to the public a host of photographs and other images of military soldiers in the field  
 18 wearing a variety of morale patches, including its angry monkey patch. In light of these facts, the  
 19 presence of a monkey design among the hundreds of patches available in *Ghosts* not only has  
 20 “some” artistic relevance, it is consistent with *Ghosts*’ efforts to evoke the look and feel of real  
 21 military soldiers and to utilize graphics of patches as a means of differentiating among soldiers in  
 22 the game. Likewise, there is no dispute that *Ghosts* does not explicitly mislead as to its source.  
 23 “[G]iven the huge success of its ‘Call of Duty’ franchise, Activision understandably has made  
 24 every effort to affirmatively negate any possible confusion regarding the source” of its games.  
 25 NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*40. *Ghosts* is no exception:  
 26 The game clearly states that it is an Activision product, makes no reference whatsoever to MSM,  
 27 does not claim to be affiliated with or sponsored by MSM in any way (in fact, the monkey patch in



*Ghosts* is substantially different from MSM's angry monkey), and thus the game does not "explicitly" mislead consumers as to the source of *Ghosts*.

Given the artistic relevance of the use of a monkey patch in *Ghosts* (certainly "above zero," E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1100 (9th Cir. 2008)), and the absence of any statements connecting the game to MSM, the First Amendment plainly applies to MSM's trademark and related claims. Accordingly, the Court should grant this Motion and enter summary judgment in Activision's favor on MSM's Second, Third, Fourth, and Fifth Claims for Relief.

#### I. STATEMENT OF UNDISPUTED FACTS.

This Motion presents an issue of pure law that requires no discovery. *Ghosts* speaks for itself, and the artistic relevance of the patch at issue can be readily ascertained from review of the game, MSM's patch, MSM's own admissions and allegations, and other widely available reference material. See generally, e.g., NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298 (relying on similar materials in granting summary judgment). Accordingly, the facts presented here are derived from the game itself, MSM's own admissions and allegations, and publicly available reference material.

**Military Morale Patches.** As MSM states in its Complaint, "*morale patches are popular among military personnel and are often worn in unofficial contexts to allow the wearer to express a sense of personal sense of identity.*" Compl. ¶ 14 (emphasis added). Other sources confirm that "morale patches" are non-regulation patches worn by military soldiers or other personnel on their uniforms, rucksacks, backpacks or other gear as a means of self-expression or to impart humor or levity during tours of duty. See Decl. of Marc Mayer ¶ 3, Ex. 7 (defining morale patches as "[u]nofficial patches that are used by a unit. Morale patches may be, but are not necessarily, approved. Such patches are designed to raise the 'morale' of the unit, thus the origins of the term."); Mayer Decl. ¶ 5, Ex. 9 at 1 ("Morale patches are similar to standard military unit designators, but are non-sanctioned and unofficial. These morale patches are typically irreverent or humorous and either support a different view of a unit/job, or poke fun at other aspects of the

1 military.”). Morale patches typically are Velcro-backed (and military uniforms are often outfitted  
 2 with a corresponding Velcro panel) so that soldiers can easily swap out one morale patch for  
 3 another depending on his or her mood or situation. See Mayer Decl. ¶ 4, Ex. 8 at 2; Mayer Decl.  
 4 ¶ 5, Ex. 9 at 2. Morale patches are sometimes collected or traded, and may be more or less  
 5 valuable depending on their rarity or popularity. See Mayer Decl. ¶ 4, Ex. 8 at 2.

6 The use of patches by members of the U.S. military is a tradition that dates back centuries.  
 7 Military patches serve a variety of purposes: They identify the soldier as being part of a particular  
 8 unit, they foster a sense of collective identity, they serve as a source of pride, and in some cases  
 9 they allow the soldier a means of self-expression. See Mayer Decl. ¶ 6, Ex. 10 (“Soldiers wear a  
 10 wide assortment of insignia, ribbons, medals, badges, tabs and patches. To the uninitiated, the  
 11 variety can be bewildering. Yet, each device represents a Soldier’s accomplishment – or that of  
 12 his or her unit – and is a great source of pride and accomplishment.”). As one author noted, since  
 13 the first use of troop insignia patches (likely during the Civil War),

14 [t]here are now thousands and thousands of patches in the modern armed forces,  
 15 depicting everything from a soldier’s unit, to the many programs a soldier might be  
 16 charged with, to his or her role within an organization. There are patches custom-  
 17 made to commemorate special events, and “Friday” patches (informal, and often  
 18 more colorful, patches that airmen are allowed to wear on Fridays). Simply put, the  
 19 military has patches for almost everything it does.

20 Mayer Decl. ¶ 7, Ex. 11 at 8-9.

21 Consistent with MSM’s assertion that “morale patches are popular among military  
 22 personnel” (Compl. ¶ 14), it is common to see such patches in images or photographs or other  
 23 depictions of military personnel. MSM, for example, has a compilation of such images on its own  
 24 website, see Mayer Decl. ¶ 8, Ex. 12, and other such depictions are readily available as well, see  
 25 Mayer Decl. ¶ 14, Ex. 18.

26 Hundreds of different morale patches are available to the public, both military and non-  
 27 military. There are clearly delineated recurring themes in the world of morale patches: Chief  
 28 among them are animals, particularly jungle animals, such as monkeys, rhinoceros, and tigers.  
See Mayer Decl. ¶ 9, Ex. 13; Mayer Decl. ¶ 13, Ex. 17 at pp. 6-7, 86-89, 132-33, 192-93, 222-223.  
 MSM’s own online store, for example, lists a separate category devoted entirely to animal patches,

1 containing thirty-three patches. See Mayer Decl. ¶ 10, Ex. 14. Other categories of patches  
 2 include: predators or venomous animals (such as snakes, sharks, and killer whales); mythical or  
 3 extinct creatures such as unicorns, dinosaurs, and chimera (such as “sharktopus”); skulls; flags;  
 4 Americana (e.g., “Don’t Tread on Me”); monsters; zombies; demons; weapons; “fun meters”; and  
 5 “pin-up” girls. Many morale patches also are overtly humorous or irreverent, and may contain  
 6 offbeat or off-color slogans such as “Major League Doorkicker” or “Embrace the Suck.” See  
 7 Mayer Decl. ¶ 9, Ex. 13; Mayer Decl. ¶ 13, Ex. 17 at pp. 6-7, 86-89, 132-33, 192-93, 222-223.

8 **MSM and Its “Angry Monkey” Morale Patch.** MSM is a military supply and outfitting  
 9 company that specializes in the design and creation of military morale patches. MSM sells a  
 10 variety of morale patches through its online store, at tradeshow, and through other online retailers  
 11 and military supply retailers. Compl. ¶¶ 17-18. MSM currently sells approximately 184 different  
 12 patches, representing a variety of common morale patch themes such as animals, pinup girls,  
 13 slogans, and “trouble makers” (i.e., obnoxious, offensive, or sexually explicit images and slogans).  
 14 See Mayer Decl. ¶ 10, Ex. 14. Several of MSM’s patches are derived from, or appropriate, third  
 15 party trademarks or copyrights such as the trademarks of Major League Baseball, Jack Daniels,  
 16 and “Team America: World Police.”

17 Among the images used on MSM’s morale patches is an image of a chimpanzee wearing  
 18 headphones with an angry expression on its face (the “MSM Monkey Patch”):



22 MSM claims that the MSM Monkey Patch is “[a]mong MSM’s most well-known designs.”  
 23 Compl. ¶ 15. MSM prominently displays on its website military personnel in the field wearing the  
 24 MSM Monkey Patch.<sup>2</sup> See Mayer Decl. ¶ 8, Ex. 12. The MSM Monkey Patch is sold both on  
 25  
26

27 <sup>2</sup> MSM is not the only provider of military patches depicting monkeys. For example, the website  
 28 “Monkey Depot” sells patches depicting a “Greaser Monkey” and “Maverick Monkey.” See  
 Mayer Decl. ¶ 11, Ex. 15.

MSM's own online store and by a variety of third-party military outfitters and websites. Compl. ¶ 18.

**Activision and the *Call of Duty* Franchise.** Activision is a video game publisher, engaged in the business of developing, financing, producing, marketing, and distributing video games, including the *Call of Duty* series of video games. As the Central District observed in rejecting a similar trademark claim against a previous *Call of Duty* game on First Amendment grounds, “[t]he ‘Call of Duty’ games are military action fantasy games, in which a player assumes control of a military soldier and fights against a computer-controlled or human-controlled opponent across a variety of computer-generated battlefields.” NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*6. To date, 10 “core” *Call of Duty* games have been released to the public, starting in 2003, including *Call of Duty*, *Call of Duty 2*, *Call of Duty 3*, *Call of Duty 4: Modern Warfare*, *Call of Duty: World At War*, *Call of Duty: Modern Warfare 2*, *Call of Duty: Black Ops*, *Call of Duty: Modern Warfare 3*, *Call of Duty: Black Ops 2*, and, most recently, *Call of Duty: Ghosts*. See Decl. of Yale Miller ¶ 2. The *Call of Duty* games take place over various time periods, including World War II and the near-future, and depict a variety of real-world settings such as Normandy, the former Soviet Union, and the Middle East. See Miller Decl. ¶ 3.

The *Call of Duty* games are known for their realistic and accurate portrayal of soldiers and special forces operatives. See NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*7 (“[The ‘Call of Duty’ game at issue] is a very realistic and convincing ... portrayal of modern combat operations.”); Miller Decl. ¶ 3. Thus, for example, the games depict real-life military units (such as the United States Army Rangers, the British SAS, and the Russian Spetsnaz) and include military weapons, vehicles, and uniforms that are based on their real-life or historical counterparts or on studied approximations of what such objects would be in 5 or 10 years’ time. See NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*7 (“The weapons depicted [in the ‘Call of Duty’ game at issue] are extremely realistic,” and “the names and logos of actual combat forces are used, such as the U.S. Army Rangers and the British Special Air Service.”); Miller Decl. ¶ 3.

1           ***Call of Duty: Ghosts***. In or about November 2013, Activision released *Call of Duty:*  
 2 *Ghosts*. Like its predecessors, *Ghosts* is a “first person” military combat action video game in  
 3 which players play as soldiers engaged in intense combat in a war-torn near-future setting. See  
 4 Miller Decl. ¶ 6. Like the other *Call of Duty* games, *Ghosts* features highly realistic and authentic  
 5 weapons, uniforms, vehicles, and settings. See Miller Decl. ¶ 6. *Ghosts* features several game  
 6 types, including a single-player story-driven campaign and a variety of online multiplayer modes,  
 7 both cooperative and competitive. See Miller Decl. ¶ 4. *Ghosts*’ primary multiplayer mode  
 8 allows players to adopt the role of a military soldier and engage in an assortment of combat-based  
 9 matches across several “maps” or locations. See Miller Decl. ¶ 8.

10           As part of the military fantasy offered by *Ghosts*’, one feature offered is that before  
 11 engaging in online play, the player may select and personalize (i.e., “customize”) his or her soldier  
 12 avatar, offering thousands of different combinations to the player. See Miller Decl. ¶ 9 & Ex. 4;  
 13 Mayer Decl. ¶ 12, Ex. 16 (“In *Call of Duty®: Ghosts* you don’t just create a class, you create a  
 14 soldier. Choose the head, body type, head-gear, and equipment, and you can even create a female  
 15 soldier for the first time. With over 20,000 possible combinations, you can create the soldier  
 16 you’ve always wanted.”). *Ghosts* offers a wide range of customization options through which a  
 17 player can modify the appearance of his or her soldier to reflect the player’s personal tastes or to  
 18 allow the soldier to be more easily recognizable on the battlefield. See Miller Decl. ¶ 9 & Ex. 4.  
 19 Through a “Customize Appearance” menu offered in conjunction with *Ghosts*’ “Create-A-Soldier”  
 20 feature, the player can modify, for example, the soldier’s gender and ethnicity, and select from a  
 21 variety of uniforms, uniform styles, headgear, and patches to be worn on the player’s uniform  
 22 during a multiplayer match. See Miller Decl. ¶ 9 & Ex. 4. The players may also choose a distinct  
 23 “background” to be displayed behind the player’s name during a multiplayer match. See Miller  
 24 Decl. ¶ 9 & Ex. 4.

25           A player is presented with, and may select from, a wide variety of patches; a total of over  
 26 600 are available in conjunction with the game. See Miller Decl. ¶ 10. Similar to various military  
 27 patches, the patches offered to players depict a small cartoon image or icon inside a geometric  
 28 shape such as a circle, octagon, or shield. See Miller Decl. ¶ 10. Selecting a particular morale

1 patch causes the patch to be placed on the left arm of the soldier's uniform when the soldier is  
 2 depicted in the game. See Miller Decl. ¶ 11. During a multiplayer match, depending on various  
 3 player choices and gameplay, a player may briefly see another player's selected patch on that  
 4 player's uniform. See Miller Decl. ¶ 11 & Ex. 5. Additionally, if a player accomplishes certain  
 5 objectives in certain multiplayer modes of the game (e.g., a string of kills), the name of the player  
 6 who performed the objective is flashed momentarily on the screen to all players in the match,  
 7 along with a small image of the patch selected by that player and, depending on the objective,  
 8 sometimes also with the "background" image selected by the player. The patch is also displayed  
 9 to the player along with other information as part of a "match summary" screen after conclusion of  
 10 the match. See Miller Decl. ¶ 11 & Ex. 5.<sup>3</sup>

11 Thirty-two patches are available at the start of the game, and hundreds of additional  
 12 patches are "unlocked" by completing challenges in multiplayer matches. See Miller Decl. ¶ 10.  
 13 (The patches other than the "standard issue" ones are initially "locked," i.e., are grayed out and  
 14 accompanied by an image of a padlock. See Miller Decl. ¶ 10.) Each of the patches offered to the  
 15 player represent the types of morale patches that are commonly seen in the field or worn by  
 16 military soldiers. Thus, just as in the real world, the morale patches available to *Ghosts* players  
 17 include animals, insects, unicorns, monsters, flags, cartoons, skulls, slogans, and many others. See  
 18 Miller Decl. ¶ 9, Ex. 4.

19 One of the more than 600 patches contained in the game is a patch depicting a cartoon face  
 20 of a chimpanzee (the "COD Monkey Patch"). The COD Monkey Patch has significant differences  
 21 from the MSM Monkey Patch – among them, the COD Monkey Patch is shaped differently, is  
 22 covered with fur, has chimpanzee-like ears, includes eyelids, and generally is less a caricature of a  
 23 monkey:

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24  
 25 <sup>3</sup> A player does not have to customize his or her soldier (many players do not), nor does he or she  
 26 have to select a patch even if other aspects of the soldier are customized. In such cases, the patch  
 27 that displays on the uniform is defaulted to a "Recruit" patch, which consists of a star and golden-  
 28 colored wings. If a player selects the default patch or some other patch other than the COD  
 Monkey Patch, a player would never see the Monkey Patch while playing *Ghosts* unless one of the  
 other players in a multiplayer match selected the Monkey Patch as his or her patch. See Miller  
 Decl. ¶ 12.



The COD Monkey Patch is just one of several patches in the game depicting animals. See Miller Decl. ¶ 9, Ex. 4.

The COD Monkey Patch does not appear in any part of the single player campaign mode, nor in the trailer advertising that game mode. See Miller Decl. ¶¶ 7, 12 & Ex. 3. The COD Monkey Patch does not appear on the packaging of *Ghosts*. See Miller Decl. ¶ 5, Exs. 1 & 2. Instead, the packaging for *Ghosts*, consistent with other games in the *Call of Duty* series, prominently displays the “CALL OF DUTY” logo in white block letters, along with logos of Activision and Infinity Ward, one of the studios that designed the game. See Miller Decl. ¶ 5, Exs. 1 & 2. Other than in the game itself, the only instance in which the COD Monkey Patch appears is in a pre-release trailer, which promotes the multiplayer game mode and illustrates various customization options. In the trailer, a very small image of the COD Monkey Patch appears, along with more than ten other morale patch images, scrolling across the screen for less than one to two seconds in the nearly three-minute-long trailer. See Miller Decl. ¶ 13 & Ex. 6. MSM is never once mentioned or referred to in *any* manner in connection with *Ghosts*, either within or outside the game.

## **II. THE FIRST AMENDMENT BARS MSM’S CLAIMS ARISING FROM THE USE OF THE COD MONKEY PATCH IN *GHOSTS*.**

### **A. Overview Of Applicable Legal Principles.**

“In cases involving free speech, a speedy resolution is desirable because protracted litigation may chill the exercise of First Amendment rights. For that reason, summary judgment is a favored remedy in free speech cases.” Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47, 54 (2006). Courts thus routinely grant summary judgment, if not motions to dismiss, for the defendant in cases involving the interplay of the Lanham Act and the First Amendment. See, e.g., E.S.S., 547 F.3d at 1099 (affirming summary judgment for defendant); Roxbury Entm’t v.



1 Penthouse Media Grp., 669 F. Supp. 2d 1170, 1172 (C.D. Cal. 2009) (summary judgment for  
2 defendant); Stewart Surfboards, Inc. v. Disney Book Grp., No. CV 10-2982, 2011 U.S. Dist.  
3 LEXIS 155444 (C.D. Cal. May 11, 2011) (motion to dismiss granted).

4 No factual discovery is required to decide this Motion, which is based on the products at  
5 issue and the manner in which the trademarks are used in those products. The applicability of the  
6 First Amendment is often decided as a matter of law simply from review of the work at issue  
7 and/or widely available source material. See, e.g., id. at \*13 & n.2; NovaLogic, -- F. Supp. 2d --,  
8 2013 U.S. Dist. LEXIS 188298. Additionally, the defendants' knowledge or intent is irrelevant.  
9 See Dillinger LLC v. Elec. Arts Inc., No. 09-cv-1236, 2011 U.S. Dis. LEXIS 64006, at \*17-\*18  
10 (S.D. Ind. June 16, 2011) (reasons why Dillinger name was used in video game were irrelevant).  
11 Accord Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012) (to decide  
12 analogous copyright fair use defense, "the only two pieces of evidence needed to decide the  
13 question of fair use" were the plaintiff's and defendant's works). Here, the parties' products speak  
14 for themselves, there are no disputed material facts, and judgment is warranted as a matter of law  
15 on Activision's First Amendment defense to MSM's trademark, false designation of origin, and  
16 unfair competition claims.

17 **B. Ghosts' Use Of The COD Monkey Patch Is Protected By The First**  
18 **Amendment Under The Prevailing Rogers Test.**

19 "[T]rademark law is concerned with the protection of symbols, elements or devices *used*  
20 *to identify a product in the marketplace and to prevent confusion as to its source.*" Capcom Co.  
21 v. MKR Grp., Inc., No. C 08-0904 RS, 2008 U.S. Dist. LEXIS 83836, at \*34 (N.D. Cal. Oct. 10,  
22 2008) (emphasis added) (quoting RDF Media Ltd. v. Fox Broad. Co., 372 F. Supp. 2d 556, 563  
23 (C.D. Cal. 2005)); see also Mark A. Lemley, The Modern Lanham Act and the Death of Common  
24 Sense, 108 Yale L.J. 1687, 1695-96 (1999) ("We give protection to trademarks for one basic  
25 reason: to enable the public to identify easily a particular product from a particular source.").<sup>4</sup>

26 \_\_\_\_\_  
27 <sup>4</sup> This Motion addresses only MSM's trademark and related claims, not MSM's separate copyright  
28 claim (its First Claim for Relief). This Motion is directed at the narrow legal question of whether  
the First Amendment shields *Ghosts*'s use of the COD Monkey Patch against allegations that such  
a patch supposedly creates confusion as to source the source of *Ghosts*. With respect to MSM's  
(...continued)



Consistent with that aim, “[t]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.” Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 900 (9th Cir. 2002) (quoting L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st Cir. 1987)). “Were [courts] to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment.” MCA, 296 F.3d at 900. Thus, “[t]he First Amendment can provide a complete defense to Lanham Act claims involving artistic works.” Roxbury, 669 F. Supp. 2d at 1175.

It now is beyond dispute that video games such as *Ghosts* are core speech protected by the First Amendment, just as are books, plays, and movies. As explained by the Supreme Court in Brown v. Entertainment Merchants Association, 131 S. Ct. 2729, 2733 (2011):

Like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.... [W]hatever the challenges of applying the Constitution to ever-advancing technology, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears.

See also Brown, 724 F.3d at 1241 (“[T]he Supreme Court has answered with an emphatic ‘yes’ when faced with the question of whether video games deserve the same protection as more traditional forms of expression.”); Kirby, 144 Cal. App. 4th at 58 (“Video games are expressive works entitled to as much First Amendment protection as the most profound literature.”); Interactive Digital Software Ass’n v. St. Louis Cnty., Mo., 329 F.3d 954, 957 (8th Cir. 2003) (“If the First Amendment is versatile enough to ‘shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,’ we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to similar protection.”). The Central District likewise concluded, with respect to a

(...continued)

copyright claim, Activision contends that the MSM Angry Monkey Patch and COD Monkey Patch are not substantially similar, including as to any protectable or copyrightable elements. MSM’s copyright claims will be addressed at a later time.

1 previous *Call of Duty* game, that “based on its compelling narrative and music, distinctive  
 2 characters, how the players interact with the virtual environment as they complete a series of  
 3 combat missions ... , [‘Call of Duty: Modern Warfare 3’] is an expressive work entitled to as  
 4 much First Amendment protection as any motion picture or any other expressive work.”  
 5 NovaLogic, 2013 U.S. Dist. LEXIS 188298, at \*29-\*30.

6 In balancing trademark law and the First Amendment, courts in this circuit have long  
 7 evaluated trademark claims involving expressive works using the test articulated in Rogers v.  
 8 Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989). See MCA, 296 F.3d at 902 (“We agree with the  
 9 Second Circuit’s analysis and adopt the Rogers standard as our own.”); E.S.S., 547 F.3d at 1099  
 10 (also employing Rogers); Brown, 724 F.3d at 1241 (“We are convinced that the Rogers test  
 11 remains the appropriate framework [for analyzing the balance between trademark and the First  
 12 Amendment].”). In Rogers, the Second Circuit Court of Appeals dismissed on First Amendment  
 13 grounds claims by the estate of Ginger Rogers against the producers and distributors of a film  
 14 titled *Ginger and Fred* about the reunion of two fictional cabaret performers. In its ruling, the  
 15 Second Circuit recognized and articulated the need for narrow construction of the Lanham Act to  
 16 avoid a conflict with First Amendment values, even if the use of the trademark might result in  
 17 some consumer confusion: “[T]he slight risk that such use of a [trademark] might implicitly  
 18 suggest endorsement or sponsorship to some people is outweighed by the danger of restricting  
 19 artistic expression, and the Lanham Act is not applicable.” 875 F.2d at 1000.

20 The Second Circuit thus crafted a specific test to determine whether the “public interest in  
 21 avoiding consumer confusion *outweighs* the public interest in free expression.” E.S.S., 547 F.3d  
 22 at 1099 (emphasis in original) (quoting Rogers, 875 F.2d at 999). Under the two-part Rogers test,  
 23 “[a]n artistic work’s use of a trademark that otherwise would violate the Lanham Act is not  
 24 actionable ‘unless [1] the [use of the mark] has no artistic relevance to the underlying work  
 25 whatsoever, or, [2] if it has some artistic relevance, unless [it] explicitly misleads as to the source  
 26 or the content of the work.’” E.S.S., 547 F.3d at 1099 (quoting MCA, 296 F.3d at 902). Rogers  
 27 has been adopted as the law in the Ninth Circuit, and it has been applied to a wide variety of  
 28 expressive works, including video games, sound recordings, photographs, and motion pictures.

See E.S.S., 547 F.3d at 1095 (video game); Mattel Inc. v. Walking Mountain Prod., 353 F.3d 792, 807 (9th Cir. 2003) (artistic photographs); MCA, 296 F.3d at 902 (popular song); NovaLogic, 2013 U.S. Dist. LEXIS 188298, at \*34 (*Call of Duty* video game). Additionally, in applying the Rogers test, it is irrelevant that some consumers might actually have been confused or even are likely to be confused. See Rogers, 875 F.2d at 1001 (“To the extent that there is a risk that the title will mislead consumers as to what the work is about, that risk is outweighed by the danger that suppressing an artistically relevant though ambiguous title will unduly restrict expression.”). All that is relevant is that the use has some minimal artistic relevance and is not *explicitly* misleading. See Louis Vuitton Mallatier S.A. v. Warner Bros. Entm’t Inc., 868 F. Supp. 2d 172, 184 (S.D.N.Y. 2012) (“[E]ven assuming, *arguendo*, that Louis Vuitton could state a cognizable claim of confusion, Warner Bros’ use of the Diophy bag is protected under Rogers because it has some artistic relevance to the Film and is not explicitly misleading.”). As a matter of law, and as set forth below, MSM cannot satisfy either prong of the Rogers test.

# 1. The COD Monkey Patch Has “Above Zero” Artistic Relevance To *Ghosts*.

“The Rogers test is relatively straightforward to apply, and is very protective of speech,” NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*35. Accordingly, it is well established in this circuit that “only the use of a trademark with ‘*no artistic relevance*’ to the underlying work *whatsoever*’” fails to warrant First Amendment protection. E.S.S., 547 F.3d at 1100 (emphases added) (quoting Rogers, 875 F.2d at 999). In other words, “[t]he level of relevance merely must be *above zero*.” Id.; see also Brown, 724 F.3d at 1243. There is good reason for this lenient standard: “This black-and-white rule has the benefit of limiting our need to engage in artistic analysis in this context.” Id. Were it otherwise, the court would be required to make subjective artistic judgments or to evaluate the merits and purposes of a creative work. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994) (“[I]t would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.”) (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)); Walking Mountain, 353 F.3d at 801 (citing same);

1 Dillinger, 2011 U.S. Dist. LEXIS 64006, at \*15 (“[I]t is not the role of the Court to determine how  
 2 meaningful the relationship between a trademark and the content of a literary work must be....”).  
 3 The “artistic relevance” prong is thus an objective analysis, and is not dependent upon the intent or  
 4 motivations of the defendant or its artists. See, e.g., id. at \*17-\*18 (“[T]hat no one can remember  
 5 how the weapons were named has little-to-no bearing on any ‘actual nexus’ between Dillinger and  
 6 the content of the *Godfather* games.”).

7 Activision’s use of the COD Monkey Patch far surpasses the “above zero” artistic  
 8 relevance threshold required to meet this first prong. “The ‘Call of Duty’ games,” such as *Ghosts*,  
 9 “are military action fantasy games in which a player assumes control of a military soldier.”  
 10 NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*6; see also Miller Decl. ¶¶ 2-3,  
 11 6. Like real soldiers in the field, players are given access to realistic military uniforms, clothing,  
 12 weapons, and technology. See Miller Decl. ¶¶ 3, 6. Uniform colors and designs are authentically  
 13 rendered, making the character appear to be a real military soldier, wearing realistic military gear.  
 14 See, e.g., Brown, 724 F.3d at 1243 (use of professional football players was relevant to game  
 15 involving competitive football matches). In the context of the fictional military field operations  
 16 depicted in *Ghosts*, it is wholly logical and appropriate for soldiers, among several other  
 17 customization options, to be outfitted with, and identified by, a variety of morale patches, just as  
 18 are active soldiers in the field. Moreover, consistent with the fact that “morale patches are popular  
 19 among military personnel and are often worn in unofficial contexts to allow the wearer to express  
 20 a sense of personal sense of identity,” as MSM admits (Compl. ¶ 14), it is also artistically relevant  
 21 to use displays of graphics of morale patches as a quick means of identifying players who  
 22 accomplish various objectives during the often-frenetic action of a multiplayer game. See Miller  
 23 Decl. ¶ 11 & Ex. 5. The use of such patches to identify a soldier during a multiplayer match is  
 24 thus “not wholly unrelated to the content of the work” (NovaLogic, -- F. Supp. 2d --, 2013 U.S.  
 25 Dist. LEXIS 188298, at \*36) and is a reasonable artistic choice as well. See also Mayer Decl. ¶  
 26 13, Ex. 17 at p. v (noting that patches are a “medium of self-expression”).<sup>5</sup>

27  
 28 <sup>5</sup> The First Amendment applies just as strongly to promotional materials in connection with  
*Ghosts*. “[C]ourts have consistently held that First Amendment protection for expressive use does

(...continued)

1 It is also a wholly appropriate artistic choice to select or devise patches in *Ghosts* that  
 2 evoke the range of morale patches available to soldiers and members of the public. See Mayer  
 3 Decl. ¶ 9, Ex. 13; Mayer Decl. ¶ 13, Ex. 17 at pp. 6-7, 86-89, 132-33, 192-93, 222-223; see also  
 4 Mayer Decl. ¶ 10, Ex. 14. Thus, the morale patches available to players naturally include patches  
 5 depicting animals, insects, monsters, skulls, weapons, cartoons, and flags. Notably, MSM  
 6 specifically alleges that its MSM Angry Monkey Patch is among its “most well-known designs”  
 7 (Compl. ¶ 15), and it has posted to the Internet numerous images of real-life soldiers wearing its  
 8 patches, including its Angry Monkey Patch. See Mayer Decl. ¶ 8, Ex. 12. Thus, the inclusion of a  
 9 patch depicting a monkey among various other animals, as but one in a slate of over 600 patches  
 10 in the game, contributes to the authenticity demanded by the game and thus is relevant to *Ghosts*’  
 11 overall design and artistic vision. Again, certainly the artistic relevance is “above zero,” which is  
 12 all that is required under Rogers. E.S.S., 547 F.3d at 1100; see also NovaLogic, 2013 U.S. Dist.  
 13 LEXIS 188298, at \*36 (in “Call of Duty: Modern Warfare 3,” the “use of the phrase ‘Delta Force’  
 14 and the MW3 Delta Force Logo give users of MW3 a particularized reality of being part of an  
 15 actual elite special forces operation and serve as a means to increase specific realism of the game”  
 16 and “help satisfy the ever increasing demand for ‘authentic simulation’ in video games ... which  
 17 undoubtably accounts for its enormous success”).

18 Several recent cases (including two Ninth Circuit decisions that deal directly with video  
 19 games) are highly analogous, if not directly on point. In E.S.S., 547 F.3d at 1095, the Ninth  
 20 Circuit evaluated trademark claims brought by the owner of a strip club (“The Play Pen”) arising  
 21 from the use of a modified version of its name and logo (“The Pig Pen”) for a fictional strip club  
 22 in the video game “Grand Theft Auto: San Andreas.” Applying Rogers, the court held that the use  
 23 of a modified version of plaintiff’s trademark was artistically relevant to the defendant’s vision in

24 \_\_\_\_\_  
 25 (...continued)

26 not rise or fall because of other, non-expressive uses, even promotional or outright commercial  
 27 ones.” NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*36 n.18 (First  
 28 Amendment still applied to video game’s use of trademarked “Delta Force” insignia even where  
 “Delta Force” logos appeared outside of the game altogether on promotional merchandise); see  
also Rogers, 875 F.2d at 999 (First Amendment applied to *Ginger and Fred* movie to protect the  
 title and its reference to Ginger Rogers outside of the work’s storyline itself).

1 re-creating a virtual, cartoonish depiction of portions of real-life Los Angeles. Id. at 1100. The  
 2 court also noted that for purposes of Rogers, it was irrelevant that the Play Pen was not “‘iconic,’”  
 3 that the game was not “‘about’” the Play Pen, or that the game could have been made without  
 4 using the Play Pen name and logo. Id. at 1099, 1100. Rather, the use was relevant to  
 5 “develop[ing] a cartoon-style parody of East Los Angeles” and, more specifically, to “recreat[ing]  
 6 a critical mass of the businesses and buildings,” and creating the distinctive “look and feel” of East  
 7 Los Angeles. Id. at 1100. The use of the COD Monkey Patch in *Ghosts* to invoke the personal  
 8 identity of soldiers and the realistic “look and feel” of the military uniforms worn by the avatars in  
 9 the game is comparable to the use of a real-life logo to evoke virtual Los Angeles.

10 More recently, in Brown, professional football player Jim Brown brought trademark claims  
 11 against video game publisher Electronic Arts (“EA”) arising from the use of his likeness in  
 12 *Madden NFL*, a football simulation video game. In versions of that game, players could create  
 13 and manage an NFL franchise populated by game characters representing professional football  
 14 players. Among the many game characters available to players was an avatar that was  
 15 recognizable as (but not identical to) plaintiff Jim Brown, including his jersey number, team  
 16 affiliation, physical attributes, playing position, and other attributes. The Ninth Circuit found that  
 17 the use of elements of the plaintiff’s likeness was justified by EA’s effort to impart “extreme  
 18 realism” to the game, and “the ‘65 Cleveland Browns cannot be the ‘65 Cleveland Browns without  
 19 the players who played for the ‘65 Cleveland Browns. This fundamental truth applies especially  
 20 to that team’s most famous player, Jim Brown.” 724 F.3d at 1243. Thus:

21 Given the acknowledged centrality of realism to EA’s expressive  
 22 goal, and the importance of including Brown’s likeness to  
 23 realistically recreate one of the teams in the game, it is obvious that  
 24 Brown’s likeness has at least some artistic relevance to EA’s work.  
 The fact that any given version of *Madden NFL* includes likenesses  
 of thousands of different current and former NFL players does not  
 impact this analysis.

25 Id.

26 Also highly analogous is Stewart Surfboards, Inc. v. Disney Book Group, LLC, 2011 U.S.  
 27 Dist. LEXIS 155444. The plaintiff, a surfboard company, brought trademark and related claims  
 28 against the Disney Book Group arising from the defendant’s use of an image of a Stewart



1 Surfboard trademark on the back cover of a book titled “Hannah Montana: Rock the Waves.” The  
 2 Court had little difficulty in finding (at the motion to dismiss phase, no less) that the use was  
 3 artistically relevant to the book, which “tells the story of Miley Stewart’s summer vacation in  
 4 which her crush of the moment, an Aussie surfer, will be competing in a major surfing  
 5 competition in her hometown and in which Hannah Montana is asked to perform at the  
 6 competition’s closing ceremonies.” Id. at \*13. Moreover, the Court noted, as is the case here, that  
 7 the Stewart Surfboards trademark has “celebrity status in the surfing community” and thus  
 8 “evokes the surfing theme that is reflected in the plot line of the book.” Id. at \*14. The Court also  
 9 specifically rejected the plaintiff’s argument that Stewart Surfboards trademark was not  
 10 “necessary” to the work or that the work did not specifically offer commentary on the trademark  
 11 itself. Id. at \*17-\*18. Rather:

An artistic use of a trademark that is only minimally relevant to the  
 underlying work is nonetheless an expressive use. Requiring that use  
 to have more than minimal relevance to the underlying work to pass  
 the ‘artistic relevance’ prong of the Rogers test would subject some  
 expressive speech to the traditional likelihood-of-confusion test that  
 does not adequately account for First Amendment interests. For this  
 reason, only minimal artistic relevance – enough relevance to satisfy  
 the Court that a use of a trademark is truly expressive, as opposed to  
 a commercial use that simply uses the mark to exploit its publicity  
 value – is necessary to satisfy the first Rogers prong. Moreover,  
 courts are ill-equipped to make the artistic judgments as to precisely  
 how important the use of a mark is to the message conveyed.

18 Id. at \*18-\*19.

19 Numerous courts, including the Ninth Circuit Court of Appeals, have come to the same or  
 20 similar conclusions, in some cases finding that the first prong of Rogers was satisfied in  
 21 circumstances where the “artistic relevance” of the use was more attenuated than it is here. See,  
 22 e.g., Louis Vuitton, 868 F. Supp. 2d at 178-79 (use of a “knock-off” Louis Vuitton bag in “The  
 23 Hangover: Part II” was artistically relevant); Dillinger, 2011 U.S. Dist. LEXIS 64006, at \*14  
 24 (“Dillinger” trademark was not infringed by its use as the name of a weapon in a video game, even  
 25 though the trademark bore only an “attenuated” relationship to the theme and purpose of the game,  
 26 because Dillinger, “commonly known for his public persona as a ‘flashy gangster who dressed  
 27 well, womanized, drove around in fast cars, and sprayed Tommy Guns,’ has above-zero relevance  
 28 to a game whose premise enables players to act like members of the mafia and spray Tommy

Guns.”); Roxbury, 669 F. Supp. 2d at 1176 (“Route 66” was artistically relevant to a sexually explicit film about road trips, even though the film had nothing to do with the actual Route 66: “Plaintiffs argument that the association is tenuous does not controvert Defendants’ showing.”).

Like the “Pig Pen” logo in ESS, or the plaintiff’s likeness in Brown, or any of a number of other examples, the inclusion of the COD Monkey Patch in *Ghosts* reflects an artistic decision that was justified and appropriate given the nature of the game and its overall context. Irrespective of whether MSM agrees with the artistic choices that were made or whether the game could have been made without the patch, there can be no dispute that the use has “above zero” relevance to the game.

## 2. The Use Of The COD Monkey Patch In *Ghosts* Does Not Explicitly Mislead As To MSM’s Sponsorship Or Endorsement Of The Product.

“To be ‘explicitly misleading,’ the defendant’s work must make some *affirmative statement* of the plaintiff’s sponsorship or endorsement, beyond the mere use of plaintiff’s name or other characteristic.” Dillinger, 2011 U.S. Dist. LEXIS 64006, at \*18 (emphasis added) (citing Rogers, 875 F.2d at 1001); Rogers, 875 F.2d at 999 (giving as examples of “explicit” endorsement the phrases “an authorized biography” or “Jane Fonda’s Workout Book”). “It is key here that the creator must *explicitly* mislead consumers.” Brown, 724 F.3d at 1245 (emphasis in original). “[I]t is well-established that the use of a mark alone is not enough to satisfy this prong of the Rogers test.” Id.; see also Roxbury, 669 F. Supp. 2d at 1176 (“Mere use, without more, is insufficient to make the use explicitly misleading.”); E.S.S., 547 F.3d at 1100 (same); MCA, 296 F.3d at 902 (if the use of a mark alone were sufficient, “it would render Rogers a nullity”); Dillinger, 2011 U.S. Dist. LEXIS 64006, at \*22 (“Plaintiff points to no *explicit* misrepresentation – that fact alone is dispositive of this issue.”) (emphasis in original). “Rather, a work is ‘explicitly misleading’ only if it contains an ‘explicit indication,’ ‘overt claim,’ or ‘explicit misstatement’ that it is sponsored by the trademark holder or about the trademarked thing.” Stewart, 2011 U.S. Dist. LEXIS 155444, at \*21.

There can be no dispute that *Ghosts* contains no such “explicit indication,” “overt claim,” or “explicit misstatement” that it is sponsored or endorsed by MSM. As the Central District has



1 recognized, “given the huge success of its ‘Call of Duty’ franchise, Activision understandably has  
 2 made every effort to affirmatively negate any possible confusion regarding the source of [its  
 3 games].” NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*40. Thus, as with the  
 4 rest of the widely known *Call of Duty* franchise, *Ghosts*’ packaging is clear as to its origin and  
 5 source: It states “CALL OF DUTY” in large white block letters as other games in the franchise  
 6 do, and it prominently displays the logos of Activision and developer Infinity Ward. See Miller  
 7 Decl. ¶ 5, Exs. 1-2; NovaLogic, -- F. Supp. 2d --, 2013 U.S. Dist. LEXIS 188298, at \*40-\*41  
 8 (“For example, [‘Call of Duty: Modern Warfare 3’]’s packaging is very clear as to its origin and  
 9 source. It prominently displays the title ‘CALL OF DUTY – MW3,’ and identifies its makers as  
 10 ‘Activision,’ and its affiliated studios, ‘Infinity Ward’ and ‘Sledgehammer Games.’”); see also  
 11 Winchester Mystery House, LLC v. Global Asylum, Inc., 210 Cal. App. 4th 579, 592 (2012) (film  
 12 not explicitly misleading where back cover of film displayed defendant’s name and identified the  
 13 film as a “MARK ATKINS” film); Stewart, 2011 U.S. Dist. LEXIS 155444, at \*26 (book not  
 14 explicitly misleading where “the book jacket and spine include the Disney logo, the ‘Disney Press’  
 15 logo, and the Disney channel logo”).

16 Further, MSM is not mentioned on *Ghosts*’ packaging, in its advertising, or within the  
 17 game in any manner. Activision has not claimed or suggested in any manner that it was made  
 18 with the participation or endorsement of MSM. See NovaLogic, 2013 U.S. Dist. LEXIS 188298,  
 19 at \*39 (“[I]t is undisputed that Activision does not explicitly misrepresent or in any manner  
 20 affirmatively state to the public that Plaintiff is associated with, sponsored, endorsed, or otherwise  
 21 is the source of [‘Call of Duty: Modern Warfare 3’]. Specifically, there is nothing within MW3 or  
 22 its packaging that could even arguably be considered explicitly misleading as to any sponsorship  
 23 or endorsement by Plaintiff.”); Stewart, at 2011 U.S. Dist. LEXIS 155444, at \*26 (“The Hannah  
 24 Montana book contains no such explicit misstatement that it is sponsored by or about Stewart  
 25 Surfboards. It does not say anything like ‘Brought To You By Stewart Surfboards’ or ‘Presented  
 26 By Stewart Surfboards,’ nor does it indicate that it is a story about Stewart or his surfboards.”).  
 27 Indeed, not only did Activision not use the COD Monkey Patch in a way that would meet the  
 28 “explicitly misleading” test, a player may well not even know that the COD Monkey Patch is in

1 the game until he or she purchases the game, plays the multiplayer mode, and either customizes a  
 2 soldier using that particular patch (as opposed to any of the 600+ other patches in the game) or  
 3 plays in a multiplayer match against another player who selects that patch. See Miller Decl. ¶ 12.<sup>6</sup>

4 Nor is any appearance of the COD Monkey Patch outside the game cause to strip First  
 5 Amendment protection from *Ghosts*. The **only** appearance of the COD Monkey Patch outside the  
 6 game is that it appears for a brief moment in a trailer for the multiplayer game mode, alongside  
 7 several other patches and purely to demonstrate that customization feature of the game. See Miller  
 8 Decl. ¶ 13 & Ex. 6. There can be no dispute that the trailer does not in any way expressly mislead  
 9 as to MSM's involvement with or sponsorship of *Ghosts*; the trailer, like the game, does not in any  
 10 way reference MSM, but rather prominently displays the white "CALL OF DUTY" logo along  
 11 with the logos of Activision and Infinity Ward. In any event, even uses that are far more overtly  
 12 promotional are encompassed within the Rogers test. See, e.g., Dillinger, 2011 U.S. Dist. LEXIS  
 13 64006, at \*19 (no loss of First Amendment protection for game even where "press releases posted  
 14 to EA's website listed the Modern Dillinger first among all the weapons"); Louis Vuitton, 868 F.  
 15 Supp. 2d at 175 (no loss of First Amendment protection for movie even where handbag was  
 16 shown in advertisements and trailers for "The Hangover: Part II"); Stewart, 2011 U.S. Dist.  
 17 LEXIS 155444, at \*2 (no loss of First Amendment protection for book where use of trademark on  
 18 the back cover of the defendant's book was for the alleged purpose of "trad[ing] upon" plaintiff's  
 19 goodwill); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001) ("A printed  
 20 article meant to draw attention [in a] for-profit magazine ... does not fall outside of the protection  
 21 of the First Amendment because it may help to sell copies."); see also n.5, supra.

22 The use of the COD Monkey Patch in *Ghosts*, then, is far from "explicitly misleading." As  
 23 with various other video games including predecessors in the *Call of Duty* series, *Ghosts* is thus  
 24 fully entitled to the protection of "the zone protected by the First Amendment," and summary

25 \_\_\_\_\_  
 26 <sup>6</sup> Indeed, if there were any remaining doubt that the use of the COD Monkey Patch is not  
 27 "explicitly misleading," it may be firmly put to rest by the fact that it is substantively **different**  
 28 from the MSM Monkey Patch. See Brown, 724 F.3d at 1246-47 ("EA changed the jersey number  
 on the Brown avatar from 32 (the number Brown wore in the NFL) to 37. If these changes had  
 any impact on whether consumers believed that Brown endorsed the game, however, surely they  
 made consumers *less* likely to believe that Brown was involved.").

1 judgment is thus warranted for MSM's Lanham Act claims. MCA, 296 F.3d at 900.

2  
3 **III. MSM'S STATE LAW CLAIMS FOR UNFAIR COMPETITION AND "COMMON**  
4 **LAW" TRADEMARK INFRINGEMENT ALSO FAIL.**

5 MSM's Fourth Claim for "Unfair Competition" and its Fifth Claim for "Common Law  
6 Trademark Infringement" are premised on the exact same facts as Plaintiff's analogous Lanham  
7 Act claims. See Compl. ¶¶ 57-59 (incorporating earlier allegations and alleging that all damages  
8 are "by reason of the Defendants' actions alleged herein"). Accordingly, these claims similarly  
9 fail under the First Amendment Rogers test, and summary judgment should be granted as to those  
10 claims as well. See E.S.S., 547 F.3d at 1101 ("Since the First Amendment defense applies equally  
11 to [plaintiff's] state law claims as to its Lanham Act claim, the district court properly dismissed  
12 the entire case on [defendant's] motion for summary judgment."); Walking Mountain, 353 F.3d at  
13 816 (affirming summary judgment on all trademark-related claims).

14  
15 **Conclusion**

16 For the foregoing reasons, this Motion should be granted and summary judgment entered  
17 in Activision's favor on MSM's Second, Third, Fourth, and Fifth Claims.

18  
19 DATED: October 16, 2014

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